Supreme Court, U.S.
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

JUDY HINES,

Petitioner

versus

FRANKLIN HOMES, INC., et al,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the state courts violated the Petitioner's constitutional rights by directing a verdict in favor of the employer and an employee at the close of Petitioner's case alleging sexual harassment pursuant to 42 U.S.C. 2000(e)?

LIST OF PARTIES

The parties to this proceedings are Judy Hines, Franklin Homes and Gene Nix.

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Petitioner herein prays that a Writ of Certiorari issue to review the judgment and opinion of the Alabama State Supreme Court entered in this action on June 21, 1996.

OPINIONS BELOW

The Alabama State Supreme Court affirmed the trial court's decision on 4/19/96, without opinion. On 6/21/96, Petitioner's Application for Rehearing was denied without opinion.

BASIS FOR JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257 in that Petitioner submits that the Appellate Courts have infringed her rights, privileges and immunities secured under the Constitution and by certain statutes, to-wit: 42 U.S.C. 2000(e), et seq.

STATUTES AND REGULATIONS INVOLVED

The statutory provisions involved are 42 U.S.C. 2000(e), et seq.

STATEMENT

In her complaint, Judy Hines alleges numerous acts of sexual harassment on the part of Gene Nix. Nix was her supervisor. On one occasion when she was first employed in the

1970's, Judy Hines went to Nix's home at the instruction of Otha James, one of her supervisors, to clean Nix's home. She was instructed to do this on company time. While there, Nix forced her to engage in sexual intercourse with him. She felt this was necessary to keep her job. She subsequently left the employment of Franklin Homes, Inc.

In 1990 or 1991, she returned to Franklin Homes' employment. Nix was no longer employed there. Six to nine months later, Nix returned to Franklin Homes, Inc. as plant manager and her supervisor. The harassment began again. Although there was no further sexual intercourse, the harassment was in the nature of sexual propositions, sexual touching, threats, sexual inuendo and sexual inquiry. She reported this to Jerry James, President of Franklin Homes, Inc. James was to call her back about the situation and advise her regarding her conplaint, but he never did. She reiterated these claims when she filed for unemployment. Hines later filed a claim with the EEOC. Nix remained employed at Franklin

Homes, Inc. until 1993 (when he voluntarily went into the hardware business).

Petitioner, Judy Hines, filed suit against Respondents, Franklin Homes, Inc. (Franklin Homes) and Cecil Eugene (Gene) Nix, her plant manager and supervisor, alleging (a) she was sexually harassed in violation of Title VII; (b) she was assaulted and battered; and (c) that her privacy had been invaded while employed at Franklin Homes.

She had filed a claim with the Equal Oportunity Commission (EEOC) and had received her "right to sue" letter. Within 90 days, she filed suit. Following her presentation of evidence at trial, the Respondents' Motions for Directed Verdict were granted. Following denial of her Motion for New Trial, Judy Hines appealed the decision.

REASONS FOR GRANTING THE WRIT

Judy Hines, the Plaintiff, testified that she is a woman of limited education who cannot read or write. She was first employed by Franklin Homes in 1977, (T. 14-15). At the time she came to work, she was recently

divorced and was the sole source of support for her family, (T. 15). Gene Nix was the plant manager, (T. 15). Her job was to clean up the trailers before they were shipped out for sale, (T. 16). This was an hourly job. Gene Nix was the person who hired her at Franklin Homes, (T. 16). Her supervisor was Otha James, (T. 18).

One morning, Otha James came in and told Judy Hines that Gene Nix, the plant manager, wanted his house cleaned, (T. 20). James told Ms. Hines that she would be called later and that she was to follow Mr. Nix to the house, (T. 20). Ms. Hines advised Otha James that she did not want to go to Mr. Nix's house. Otha James advised her that if she did not go, she would be fired, (T. 20). Consequently, Hines reluctantly followed Nix to his house, (T. 20). She did not clock out during the time she went to Nix's home. Ms. Hines and Gene Nix arrived at the house, (T. 21). There was no furniture in the house, (T. 21). Nix's clothing was scattered about, (T. 21). Nix took two shirts out of the closet and laid them in the floor of the bedroom for a pillow. She then had sex

with Gene Nix, (T. 21). She stated she had sex with Nix because she felt she would loose her job if she did not, (T. 22). She had three children at home to care for, (T. 22). Before they left the plant, James told Hines not to clock out, (T. 22).

Upon returning to work, Hines stated she was very upset, (T. 22). She told one co-worker about the incident, (T. 23). For the rest of her employment at Franklin Homes, she took measures to avoid ever being alone with Nix, (T. 24). She was eventually laid off from her employment with Franklin Homes by Gene Nix, (T. 24). To her knowledge, she was the only employee laid off at that time, (T. 24). At no time after the one incident did she have any further sexual intercourse with Gene Nix. At the time she was employed at Franklin Homes, she had earned about $6.00 per hour, (T. 16).

Judy Hines then went to work for the Cushion House, (T. 25). Not until the 1990's did she reapply for employment at Franklin Homes, (T. 25). Before applying, she made certain that Gene Nix was no longer employed by

Franklin Homes, (T. 26). She discussed with Jerry James, the plant president, that she had previously worked at Franklin Homes, (T. 27). She began working for Franklin Homes again on August 28, 1990, (T. 27). She was hired to build rafters for the mobile homes. While she was paid a production rate, she earned approximately $4.25 per hour, (T. 28). About seven to eight months later, Gene Nix returned to work at Franklin Homes as the plant manager, (T. 28-29). She was laid off at the time Nix returned, (T. 31). She was recalled by Gene Nix personally, (T. 31). Nix told her he would come to her home and pick her up that day, (T. 31). Ms. Hines advised Mr. Nix she would report in on her own the next day, (T. 31). She returned to work the next day, as promised. She told Nix that she needed help building the rafters and could not do the job alone, (T. 31). Nix stated that he was going to put her back to cleaning trailers, (T. 32). With this, she agreed, (T. 32). In fact, Nix did not put her back to cleaning trailers, (T. 33). When she and Nix discussed the fact that she needed

assistance in the building of rafters and that she felt she deserved a raise, Nix advised her "you know what you have to do for a raise". She advised him she did not do things like that for a raise, (T. 33). Following that, he continued to "harass her for sex", (T. 33). She stated that Nix asked her to go to a motel, to her house and other places to have sex, (T. 33). She continued to complain to Nix about not getting any assistance in the building the rafters, (T. 33). All other persons building rafters had two people performing the job, (T. 33).

Nix's office was above the plant floor in the middle of the plant, (T. 34). Nix would come by and sit close to her and watch her while she did her job, (T. 34). Other times, he would call her into his office and talk about his wife having had a hysterectomy and that his wife no longer wanted to have sex with him, (T. 35). On at least one occasion, Nix laid his hand on top of Hines, (T. 35). He made numerous comments and requests that Hines have sex with him, (T. 35). She did not

initially complain to the president, Jerry James, but made it clear to Nix, the plant manager and her supervisor that she did not want to have sex with him, (T. 35). She further advised Nix she did not want to have anything to do with him and he would just laugh at her. She would advise him that she did not have to work for sex, (T. 36). She stated that as time passed, the worse the situation got with Nix, (T. 36).

In April, 1992, Hines had gotten sick at work on a Thursday. Employees at Franklin Homes are paid on Fridays, so she had called Nix about getting her check and having her son pick it up, (T. 40). Once again, Hines asked Nix about a raise. He reiterated that "she knew" what she had to do to get a raise, (T. 41). Her son picked up her check on Friday which reflected no raise, (T. 41). The following Monday, Hines called Jerry James, the president, to tell him she refused to work under Nix any more and that Nix had continually harassed her for sex until the day she had taken off after getting sick at work, (T. 42).

She told James that she could no longer work under Nix because he had "harassed her for sex". She then related the incident in 1970 which had occurred at Nix's house to James, (T. 43).

James' response was to ask her if she had liked it, (T. 43). Hines responded that she did not. James then asked her what she wanted him to do about the situation to which Hines stated she did not know but she did not want to work under Nix any longer, (T. 43). James promised to check into the situation and get back with her, (T. 43). James never did, (T. 44). "Bones" Creel, a salesman for the company, had a conversation with Judy Hines in which he asked her if she was quitting, (T. 45). Hines advised him that she was not going to quit that she liked working for Franklin Homes, (T. 45). After she learned that Franklin Homes considered her to have quit, she filed for unemployment, (T. 46). At the unemployment hearing, Nix attended on behalf of Franklin Homes, (T. 48). During the course of the hearing while the unemployment officer

looked away, Nix reached over her and touched her leg in the process of trying to get to a phone in the office, (T. 49). Following the hearing, Nix accused her of lying, (T. 50). Within the jurisdictional time limits, Judy Hines filed the claim with the Equal Employment Opportunity Commission (EEOC) regarding the sexual harassment, (T. 50). During the course of the unemployment hearing, Hines complained about the sexual harassment which she had received at Franklin Homes.

On other occasions, Hines described that Nix had played "footsie" with her in the office after he had called her into the office under the guise of discussing other matters with her. On one occasion, Nix called her into the office to tell her that his wife had refused to have sex with him and if Hines would not have sex with him, did she have any friends who would be interested in having sex with him, (T. 58). Anytime the issue of a raise came up, Nix would reiterate that she knew what she had to do to get a raise and then suggest that they go to her house or to a motel, (T. 59).

On cross-examination, Hines stated that she had a sixth grade education although her employment files stated that she had an eleventh grade education. She stated she was too embarassed to admit that she had the sixth grade education at the time she applied for employment, (T. 64-65). The EEOC complaint reflects the last date of harassment to have been 5/4/92 when she had arguably already left the employment of Franklin Homes, (T. 75). Ms. Hines stated that when the papers were sent to her, she had signed without reading them because she could not read although she thought she had told the EEOC the proper date, (T. 83). She reiterated that she felt going to Nix's house was part of her job and if she did not go on that occasion she would have no job when she returned, (T. 85). She stated that she would not have returned to work at Franklin Homes in 1990 if Nix had still been employed there, (T. 85). She again described the sexual harassment which she had endured at Franklin Homes, (T. 94). Again, she described the incident leading up to her no longer being at Franklin Homes,

to-wit: she had gone home sick on a Thursday. The following day, she called to say that her son would be picking up her check, (T. 98). Nix had promised her a raise in the past. She asked him again about the raise to which he stated again, "you know what you have to do for a raise", (T. 98). She hung up the phone. There was no raise in her check, (T. 99). The following Monday, she called Jerry James and told him about the sexual harassment inlcuding the incident in the 1970's. She said that she did not hate Gene Nix just what he had done to her, (T. 100). She specifically described several incidents which has occurred during the time of employment with Franklin Homes which she stated formed the basis of her lawsuit. That on one occasion, Nix had put his hands on top of hers (T. 112); that he had played footsies with her in the office (T. 113); and the incident at the unemployment office. She stated that he had laid his arm in her lap as he reached over her at the unemployment office, (T. 116). None of the touching was welcomed, (T. 119). The touching usually followed

discussions about her feeling she should get a raise, (T. 119).

Following the initiation of the EEOC complaint, Hines requested a right to sue letter which she received, (T. 52).

Cecil Eugene (Gene) Nix was the next witness called. He was called as an adverse witness, (T. 131). He testified that he now owned a hardware store, but had previously worked at Franklin Homes as a plant superintendent. He had worked in the 1970's, (T. 132) and had subsequently come back to work as a plant superintendent on a temporary basis, (T. 136). He testified that the only person who was over him in rank was the president/ owner, Jerry James, (T. 133). All 12 department heads were under his supervision. Judy Hines, as an employee, was under him, (T. 133).

He testified that in 1977, Judy Hines cleaned homes before they were shipped out, (T. 134). He was divorced in 1977, (T. 134). He denied that Judy Hines had ever gone to his home or that the incident which she had

described had occurred, (T. 135). He testified he left Franklin Homes in 1981 to go into private business, (T. 135). He returned again in 1990 or 1991 as plant superintendent and Judy Hines was an employee there when he returned, (T. 136). He specifically denied that he had ever called Judy Hines and told her he would pick her up to bring her to Franklin Homes to work, (T. 138). He had no problem with the quality of her work although he said that he had some complaints about her medical problems with her neck and back, (T. 138). He denied any sexual conversations with her, (T. 139). He did state, however, she had asked him out one time when he was married. She had asked him to a "candlelight dinner", (T. 139). He never told anyone about the invitation until after the suit was filed, (T. 140). He denied that Judy Hines had told him she was sick on the last day that she had worked at Franklin Homes in April, 1992, (T. 141). He denied any physical contact whatsoever with Judy Hines or he that had played footsies with her, (T. 142). He denied any conversations about raises, (T.

143). He denied that she had complained about needing help in building the rafters, (T. 144). He denied that he had touched her hands by laying his hand on top of hers, (T. 144). He had no idea of what Judy Hines had earned when she worked there. He denied having any conversation with her regarding her final paycheck being picked up by Judy Hines, (T. 147). Not until Jerry James told him Judy Hines planned to sue for sexual harassment, approximately a week after the last date that she worked, did he know anything about any complaint for sexual harassment, (T. 150). He specifically denied any sexual harassment of Judy Hines, (T. 152). He stated that he had never received any adverse action on the part of Franklin Homes as the result of any sexual harassment, (T. 152). He did acknowledge that he had at the unemployment compensation hearing regarding Judy Hines. He denied ever having reached over and touching her during the unemployment hearing. At that time, the tape of the unemployment hearing which reflected contrary evidence was admitted as Plaintiff's

Exhibit "6", (T. 153).

Jerry James next testified, (T. 160). He testfied that he is the president of Franklin Homes, (T. 160). He stated that Judy Hines had called him around April 30, 1992, and told him that Gene Nix had been sexually harassing her, (T. 164). Judy Hines told him to think about what she had said and call her back, (T. 164). He testified he asked Gene Nix who denied the allegations, (T. 164). He spoke with a few other employees, one who worked in the front office but knew Judy Hines, one who worked near Judy Hines and another employee and no one seemed to know anything about any sexual harassment, (T. 164-166). He gave no credence to her story so he never called her back, (T. 168). He acknowledged that Franklin Homes has a sexual harassment policy which "guarantees" that no sexual harassment will be tolerated. Despite this, he never contacted Judy Hines again, (T. 169).

Paul Laudenslager was the next witness called, (T. 172). He testified that he lives with Judy Hines, (T. 173). He worked at

Franklin Homes setting roofs at one time, (T. 173). From where he worked, he had a clear view of Judy Hines and other employees. He frequently saw Gene Nix around Judy Hines, (T. 174). He saw Nix sneeking behind wood bundles and watching Judy Hines for long periods of time, (T. 177; 188). He would watch Gene Nix come up from behind Judy Hines and put his hands on her and pinch her, (T. 190). In June or July of 1991, he was in the mill area with Judy being approximately 30 yards away. He saw Nix come behind Judy Hines and stand and stare at her for a long period of time, (T. 192). When Judy had to work overtime, she would ask Paul to stay as well, (T. 194). He observed Gene Nix doing things of a sexual nature with other employees on one occasion and seen him pinching a woman employee on the rear end, (T. 197). Gene Nix fired Paul in October, 1991, (T. 198). Paul acknowledged that he was the one who had written a letter to the EEOC on behalf of Judy Hines, (T. 200). Judy had told Paul that she was planning to sue her employer for sexual harassment by Gene Nix, (T. 206).

He testified that he saw Nix sexually harass Judy Hines with the way he talked to her and made lewd remarks to her, (T. 207). He felt that he had been fired by Gene Nix because he posed a threat to Gene Nix getting to Judy Hines, (T. 212).

Elaine Calvert testified that she had worked for Franklin Homes in 1977 as a clean-up person, (T. 218). She knew of the occasion when Judy Hines had gone to Gene Nix's house to clean it, (T. 221). She observed that she thought Judy Hines had been drinking when she returned from Nix's home that time, (T. 222). Judy Hines told her what had happened at Nix's house that day, (T. 223).

Wayne Hines, Judy Hines' son, testified that he worked at Franklin Homes when Judy did in the 1990's, (T. 226-227). At this time, the court sustained the Defendant's objection and effectively denied Wayne Hines the opportunity to testify for purposes of impeachment that he had seen Gene Nix have sexual encounters with other female employees when Nix had testified on direct examination that such events had not

occurred, (T. 227-230). The substance of Hines' testimony was made through an offer of proof by Plaintiff on the record, (T. 227-231).

Larry Oswalt next testified, (T. 231). He testified that he presently worked at Franklin Homes although when he wrote a letter to the EEOC on behalf of Judy Hines, he was working at Golden Poultry, (T. 231). He built rafters at Franklin Homes. He had observed Judy Hines stressed and upset at the job, (T. 234). The court denied the Plaintiff's offer of the letter which he had written to the EEOC which was offered for purposes of refreshing his recollection, (T. 234; 244). He testified that he had told Jerry James after Judy Hines no longer worked at Franklin Homes that Gene Nix would come around and talk to Judy Hines as well as other employees, (T. 241). He observed Judy crying on the job, (T. 252).

With this, the Plaintiff rested, (T. 252). At that time, the Defendants made a motion for directed verdict which was followed by argument, (T. 253-266). The court then granted the Defendants' motion, (T. 267). Timely

notice of appeal then followed. Following the denial on the motion for new trial, Plaintiff gave notice of appeal, (T. 448-449; 451; 452-453).

The facts as herein set forth clearly establish a prima facie case of sexual harassment under Title VII assault and battery and invasion of privacy for which a directed verdict should never have been granted.

Sexual harassment in the workplace is a prohibited form of sex discrimination, **Meritor Savings Bank v. Vinson**, 477 U.S. 57, 65-67. It is sufficient to show timeliness if the Plaintiff can show that the workplace remained hostile during some portion of the 180 day limitation period preceding filing with the EEOC, **Beavers v. American Cast Iron Pipe**, 975 F.2d at 792 (11th Cir. 1992). The scope of the allegations in Title VII complaints may be much broader than the allegations in the administrative charge. The allegations "may encompass any kind of discrimination like or related to allegations", **Evans v. U.S. Pipe and Foundry Co.**, 696 F.2d 925 (11th Cir. 1983).

There are two types of sexual harassment. Quid pro quo or what might be termed as physical or tangible sexual harassment is best explained in the supervisor/subordinate setting. The employee is forced to yield to the sexual demand or suffer such adverse consequences. The employer is absolutely liable for quid pro quo harassment by a supervisor who has supervisory authority over the harassed individual, **Sparks v. Pilot Freight Carriers, Inc.**, 830 F.2d 1554 (11th Cir. 1987). This means the employer should be liable even if he did not know of or approve of the supervisor's actions. Where a supervisor is acting within the line and scope of his authority to hire, fire, promote, etc. to extort sexual favors from an employee, the employer should be held strictly liable for the conduct, **Sparks v. Pilot Freight Carriers**, 830 F.2d 1554 (11th Cir. 1987). The mere fact that an employer has a policy prohibiting sexual harassment cannot insulate an employer in quid pro quo cases, particularly where the complainant must report any grievances to her

supervisor, the alleged offender, to invoke internal procedures, Meritor at 72-73. Evidence of sexual advances made to other employees may be admitted on the issue of motive, intent or plan in making the sexual advances towards the plaintiff, **Longmire v. Alabama State University**, 151 F.R.D. (M.D. Ala. 1992).

Hostile work environment is the most recently recognized form of sexual harassment, Meritor. Meritor accepted the theory that sexual harassment could be based on the work environment itself rather than just the "economic" or "tangible" loss of benefits.

There are five basic elements to this form of harassment, **Henson v. City of Dundee**, 682 F.2d 897 (11th Cir. 1983). The person must be (a) a member of a protected class; (b) subjected to unwelcome sexual conduct (e.g. foul language, dirty jokes, suggestive comments); (c) harassed upon the basis of sex and (d) effective as to a term, condition or privilege of employment. The final element requires either that the harasser was working

in a supervisory capacity or the employer knew of the conduct.

Sexual harassment of this type is a continuous violation, it is not the "present consequences" of a discreet act, **Saville v. Houston County Healthcare Authority**, 852 F.Supp. 1512, 1522 (M.D. Ala. 1994).

An employer is liable for a supervisor's actions in a hositle environment case if "apparent authority" under an agency theory is also present, Saville.

A complaint of sexual harassment may also have claims for assault and battery, invasion of privacy and/or tort of outrage, Quillen. Likewise the employer may be liable for its own acts, **Big B. Inc. v. Cottingham**, 634 So.2d 999 (Ala. 1993); **Potts v. BE & K**, 604 So.2d 398 (Ala. 1992).

When the court grants a directed verdict, there is no presumption of correctness, **K.S. v. Carr**, 618 So.2d 707 (Ala. 1993). In reviewing the granting of a directed verdict, the court must view all of the evidence in a light most favorable to the non-movant, and must entertain

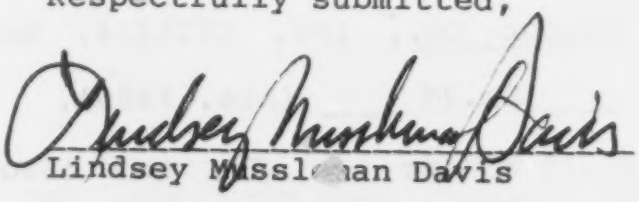
reasonable evidentiary inferences that the jury would be free to draw, **Teague v. Adams**, 638 So.2d 836 (Ala. 1994).

It is apparent that the Petitioner Judy Hines made out a prima facie case of all of the claims alleged. Numerous questions of fact remained for the trier of fact, thus precluding a grant of directed verdict as to any issues raised in Appellee' motions. Thus, Petitioner, Judy Hines, moves the Court to grant her Petition for Writ of Certiorari.

CONCLUSION

The evidence and testimony set forth by the Petitioner at trial clearly make out a prima facie case for the wrongs alleged in her Complaint. To summarily dismiss them at the close of the evidence was clear error under applicable law and procedure and violative of her constitutionally protected rights. Petitioner respectfully requests this Court to remedy the error through grant of her Petition for Writ of Certiorari.

Respectfully submitted,



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STATE OF ALABAMA--JUDICIAL DEPARTMENT
THE SUPREME COURT
OCTOBER TERM, 1995-96

1941797

Judy Hines v. Franklin Homes, Inc., and Gene Nix; appeal from Franklin Circuit Court, CV-94-167.

BUTTS, JUSTICE

AFFIRMED. NO OPINION.

See Rule 53(a)(1) and (a)(2)(f), Ala.R.App.P.; and Mardis v. Robbins Tire & Rubber Co., [Ms. 1931474, November 3, 1995] ____ So.2d ____ (Ala. 1995).

Hooper, C. J., and Almon, Houston, and Ingram, JJ. concur.

IN THE SUPREME COURT OF ALABAMA
June 21, 1996

1941797

Judy Hines v. Franklin Homes, Inc., and Gene Nix. (Franklin: CV-94-167)

NOTICE

The application for rehearing filed in this cause is overruled. No opinion written on rehearing.

BUTTS, J. - Hooper, CJ., Almon, Houston and Ingram, JJ., concur.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.
Witness my hand this 21st day of June, 1996.

/s/ Robert G. Esdale
Clerk, Supreme Court of Alabama